Supreme Court, U.S.
FILED

No. (1)

931876 MAY 20 1994

IN THE

Supreme Court of the United States

OFFICE OF THE CLERK

October Term, 1993

STEVEN LUONG,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARGARET E. ALVERSON
Of Counsel
70 Lafayette Street
New York, NY 10013
(212) 349-0055

J. DONICE ALVERSON
Counsel of Record
650 Poydras Street
Suite 2700
New Orleans, LA 70130
(504) 524-7603

Attorneys for Petitioner, Steven Luong

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(5978—1994)
Printed on Recycled Paper

60 pp

Questions Presented for Review

1. Can a RICO criminal enterprise constitute the affected interstate commerce, the only federal interest implicated in the Hobbs Act, 18 U.S.C. §1951, so as to confer the sole basis of federal jurisdiction?

2. If so, did the government engage in arbitrary, discriminatory, and impermissibly selective prosecution in violation of the Equal Protection clause?

List of Parties

This petition for writ of certiorari results from a criminal trial involving the United States government and four individual criminal defendants[1].

Respondent:	United States of America
Petitioner-defendant:	Steven Luong
Co-defendants:	Dai Quoc Lu Tien Tuan Ngu William Ho

[1]Co-defendants Lu, Ngu, and Ho also appealed to the United States Court of Appeals for the Third Circuit, which consolidated all four appeals. Petitioner Luong and all convicted co-defendants adopted one another's issues by reference, pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure. The Third Circuit remanded the co-defendants cases for reconsideration of sentence. *See* App. 4. A fifth co-defendant, one Tom Truong, was acquitted by the jury.

Table of Contents

Page

Opinions Below 2

Jurisdiction 2

Statutes Involved 3

Statement of the Case 5

ARGUMENT:

Introduction. Interplay between the Commerce Clause and the Hobbs Act..... 8

Where is the interstate commerce element? 12

Categorizing a prostitution enterprise as interstate commerce for jurisdictional purposes conflicts with applicable decisions of this Court 13

Whether purely illegal activity, not associated with lawful enterprises, can constitute interstate commerce under the Hobbs Act is a question of first impression and an issue which should be resolved by this Court 14

The decision below so far departs from the accepted and usual course of judicial proceedings, including the applicable decisions of this Court, as to call for the exercise of this Court's power of supervision 16

Page

The decision below departs from decisions of this Court, rejects the rule of lenity, and violates principles of federalism 19

Arbitrary, discriminatory, impermissibly selective prosecution occurred to petitioner's detriment due to the government's abuse of discretion and abuse of power of the office 21

Should this Court grant certiorari to correct one aberrant decision on jurisdiction? 27

Conclusion 27

CONTENTS OF APPENDIX

Page

A. Judgment Order of the United States Court of Appeals for the Third Circuit, *United States v. Luong*, No. 92-1907, February 23, 1994 ..... A1

B. Judgment and Commitment Order, Eastern District of Pennsylvania, *United States v. Luong*, Docket No. 91-119-03, filed October 20, 1992; entered April 9, 1993 ..... A4

C. Unpublished Opinion of the United States Court of Appeals for the Third Circuit in *United States v. Lu*, No. 92-1797, consolidated appeals of co-defendants..... A12

D. Text of the Mann Act, 18 U.S.C. §§2421-2424 ... A21

TABLE OF AUTHORITIES

Page

CASES:

Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917)..... 13

Evans v. United States, ____ U.S. ____, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992)..... 11, 20

Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 6 L.Ed. 23 (1824) 16

Gregory v. Ashcroft, ____ U.S. ____, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) 20

Heart of Atlanta Motel v. United States, 379 U.S. 241, 85 S.Ct. 348 (1964)..... 16, 17, 18

Katzenbach v. McClung, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964) 28

Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971)..... 20, 21,

Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed. 252 (1960)..... 10, 11

Page

United States v. Archer, 486 F.2d 670, (2d Cir. 1973). *passim*

United States v. Bass, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed. 448 (1971) 20

United States v. Blakey, 607 F.2d 779 (7th Cir. 1979) 14

United States v. Coolidge, 1 Wheat. 415, 4 L.Ed. 124 (1816) 11

United States v. Enmons, 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973)..... 15, 19, 20

United States v. Hanigan, 681 F.2d 1127 (9th Cir. 1982) *cert. denied*, 459 U.S. 1203 (1983) 14

United States v. Hudson and Goodwin, 7 Cranch 32, 34, 3 L.Ed. 259 (1812) 11

United States v. Lu, No. 92-1797..... 2

United States v. Redondo-Lemos, 955 F.2d 1296 (9 Cir. 1992) 26

United States v. Staszcuk, 517 F.2d 54 (7 Cir. 1975) . 9

United States v. Wander, 601 F.2d 1251 (3 Cir. 1979). *passim*

United States v. Yokley, 542 F.2d 300 (6th Cir. 1976). 15, 20

Page

Wayte v. United States, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) 22

Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) 23

STATUTES:

28 U.S.C. §1254(1) 2

Hobbs Act:

18 U.S.C. §1951 ..... 3, 4, 5

18 U.S.C. 1961, *et seq.* ..... *passim*

Mann Act:

18 U.S.C. §§2421-2424 ..... 6, 8, 12, 13

18 U.S.C. §3231 ..... 3, 4, 5

Travel Act, 18 U.S.C. § 1952 13

OTHER AUTHORITIES:

Friendly, Federal Jurisdiction: A General View (1973) 21, 23

Moore's Federal Practice par. 0.6[4] (1991) 9, 11

Page

N. Abrams, Consultant's Report on Jurisdiction, 1 Working Papers of the National Commission on Reform of Federal Criminal Laws, 33, 36 (1970) 10

Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Georgetown L.J. 1171, at 1172 (1977) 10, 11, 21

Tribe, American Constitutional Law (1978 ed.) §5-2 at 225, n.2.; §6-3 at 321 9

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994.

STEVEN LUONG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Steven Luong ("Luong") petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Opinions Below

The "Judgment Order" of the United States Court of Appeals for the Third Circuit, affirming petitioner Luong's conviction, was issued February 23, 1994, and is not reported; it is reprinted at Appendix ("App.") 1. The district court did not issue an opinion. The district court's "Judgment and Commitment Order" was filed on October 20, 1992, and entered on April 9, 1993. It is reprinted at Appendix 2. The docket entry sheet showing the dates of filing and of entering the Order of Judgment and Commitment is attached at Appendix 3. The unpublished opinion of the United States Court of Appeals for the Third Circuit in *United States v. Lu,* No. 92-1797, consolidated appeals of co-defendants, remanding on a sentencing issue, is attached at Appendix 4.

Jurisdiction

A "Judgment Order" affirming petitioner Luong's conviction and sentence was entered by the United States Court of Appeals for the Third Circuit on February 23, 1994. App. 1. No rehearing was sought. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

This Court should exercise its discretion to grant the writ based on the following factors:

1. Categorizing a prostitution enterprise as interstate commerce for jurisdictional purposes conflicts with applicable decisions of this Court.

2. Whether purely illegal activity, not associated with lawful enterprises, can constitute interstate commerce under the Hobbs Act is a question of first impression and an issue which should be resolved by this Court.

3. The decision below so far departs from the accepted and usual course of judicial proceedings, including the applicable decisions of this Court, as to call for the exercise of this Court's power of supervision.

4. The decision below departs from decisions of this Court, rejects the rule of lenity, and violates principles of federalism.

5. Arbitrary, discriminatory, impermissibly selective prosecution occurred to petitioner's detriment due to the government's abuse of discretion and abuse of power of the office.

6. This Court should grant certiorari even if it be to correct one aberrant decision on jurisdiction.

Statutes Involved

This case presents a question of federal jurisdiction under the Hobbs Act, 18 U.S.C. §1951, which makes extortion a federal offense if interstate commerce is affected. Jurisdiction over offenses against the United States is conferred on the district courts by 18 U.S.C. §3231.

18 U.S.C. §3231, 62 Stat. 826:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

18 U.S.C. §1951, 62 Stat. 793 (the "Hobbs Act"):

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section--
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by

wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Statement of the Case

Appellant Luong was charged with violating the Hobbs Act, 18 U.S.C. §1951, which makes extortion a federal offense if interstate commerce is affected. After a four week jury trial, Luong was convicted of extorting protection payments from the madams of massage parlor-brothels in Philadelphia[2]. He was sentenced on October 20, 1992, to a term of imprisonment for 120 months. The United States Court of Appeals for the Third Circuit affirmed his conviction and sentence on February 23, 1994. App. 1.

Federal district courts have jurisdiction over offenses against the United States pursuant to 18 U.S.C. §3231.

[2]One defendant was acquitted. Three co-defendants, Dai Quoc Lu, Tien Tuan Ngu, and William Ho, were also convicted. The appeals were consolidated by the United States Court of Appeals for the Third Circuit. A separate opinion, however, was issued as to the other three defendants, remanding for resentencing proceedings. That opinion, also not published, is reprinted at Appendix 4.

Whether there was federal jurisdiction over this case is the salient issue in this petition.

Luong and others were charged with seeking protection payments from two madams of named Philadelphia houses of prostitution. Their defense was that they were employed by the madams and that they were paid compensation, not extortion payments. Trial testimony developed various matters involving sordid activity localized in Philadelphia.

Testimony at trial revealed that the Pennsylvania Crime Commission, the Philadelphia Police Department, the FBI, and the IRS all were investigating two Philadelphia madams and their houses of prostitution. The two madams had a seemingly unlimited capacity for violating Title 18 of the United States Code, including bribing undercover IRS agents in lieu of paying taxes. Although it was the IRS which curtailed the criminal careers of such notorious law breakers as Al Capone, the two madams were allowed to enter very favorable plea bargain agreements, resulting in their escaping their brush with authority relatively unscathed. They became "cooperating witnesses" in the ongoing investigations of their own establishments, which they continued to operate. They continued to avoid IRS reporting and filing requirements, continued not to pay taxes, penalty, or interest, and continued not to be audited.

Both madams testified that they purchased their brothels with earnings from prostitution[3]. The madams' testimony established that their prostitution businesses violated most, if not all, of the Mann Act provisions.[4] Both women testi-

[3]This appears to be violative of the RICO statutes, 18 U.S.C. §1961 et seq.

[4]18 U.S.C. §§2421-2424. *See* Appendix D.

fied that they used facilities in interstate commerce to procure young women for their prostitution establishments. These facilities included advertising in Korean language newspapers in other states, speaking by telephone to young women in other states, and driving to the airport to procure recruits arriving from other states.

Further illegal activities in the madams' prostitution businesses included violations of alcoholic beverage control laws, possession of an illegal gambling device, and failing to ascertain and report the immigration status of their recruits for prostitution.

Both madams' plea agreements required them to cooperate with the government and to testify as government witnesses. As of the date of trial below, one madam had still not been sentenced; the other had been sentenced to probation.

According to the testimony of an agent of the Pennsylvania Crime Commission, despite the Crime Commission's knowledge of the madams' prostitution enterprises, no charges were brought against them. They continued to operate their prostitution enterprises openly for three years. Although arrests were made at other massage parlors, none were made at these two madams' establishments. The agent further testified that he refused to disclose the identity of one of the madams to an ATF agent who sought to bring charges against her for a gun violation. The agent testified that when the madams testified before the Crime Commission, they denied being extorted by defendants and made no mention of them when questioned about "Asian organized crime." No perjury charges were recommended or brought against them as a result of their testimony before the Pennsylvania Crime Commission.

Of particular relevance to the jurisdictional issue is the fact that there has never been any contention in this case that any lawful business or legitimate interstate commerce was involved. It was part of the prosecution's trial strategy to admit that the madams' "businesses" were not engaged in lawful activities, describing them in both opening statement and closing argument as "illegal" and as "prostitution businesses"[5]. The trial court charged the jury that the houses of prostitution were "businesses claimed to be in interstate commerce.[6]" As presented by the prosecution and as charged to the jury by the trial court, the case squarely presents the question whether a prostitution business, which constitutes a RICO enterprise[7], and which itself exists and operates in violation of federal law (the Mann Act, 18 U.S.C. §§2421-2424), can use its Mann Act violations as elements of interstate commerce so as to invoke both jurisdiction under the Hobbs Act and the protection of the United States government[8].

ARGUMENT

Introduction:
Interplay between the Commerce Clause and the Hobbs Act

There is perhaps nothing more important in the historical development of the United States than the power to regulate

[5]April 8 TR. at 67-68; April 27 TR. at 91.

[6]Jury Charge, April 28, 1992, TR. at 127.

[7]18 U.S.C. §1961 et seq., Racketeer Influenced and Corrupt Organizations, defining racketeering activity to include "white slave traffic" offenses violating §§2421-2424.

[8]If the business in interstate commerce comprises the federally protectible interest, *ipso facto* the protection of the United States government is invoked.

commerce. The Commerce Clause to the Constitution has been the major source used by Congress to extend the reach of federal legislation, both civil and criminal. In discussing the history of the Hobbs Act, Justice (then Judge) Stevens quoted the following passage from Justice Rutledge:

> [it was] to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view to Philadelphia. Thus the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the proximate cause of our national existence down to today.
>
> . . .
>
> So by a stroke as bold as it proved successful, they founded a nation, although they had set out only to find a way to reduce trade restrictions. So also they solved the particular problem causative of their historic action, by introducing the commerce clause in the new structure of power.

United States v. Staszcuk, 517 F.2d 54 (7 Cir. 1975) (*en banc*), at 58, quoting W. Rutledge, A Declaration of Legal Faith, at 25-26 (1947). *See also* Tribe, American Constitutional Law (1978 ed.), §5-2 at 225, n.2.; §6-3 at 321.

Parallel to its role in the molding of the nation is the Commerce Clause's place in Congress' conferring of federal jurisdiction[9] over offenses, many of which Congress

[9]*Cf.* 1 Moore's Federal Practice par. 0.6[4] (1991).

has "federalized" by proscribing, if they affect interstate commerce, what would otherwise be common law or local offenses.[10]

The Hobbs Act enjoys preeminent status in the expansion of federal criminal jurisdiction via the Commerce Clause. As one commentator has observed:

> what has become the principal vehicle for this rapidly expanding federal effort is the Hobbs Act, a statute enacted over thirty years ago as a weapon against labor racketeering.[11]

There can be no doubt that the Hobbs Act is subject to an expansive interpretation. The jurisprudence shows the judiciary's willingness to extend the Act's coverage to the limits of jurisdiction. Petitioner Luong submits that those limits have been exceeded in this case.

In *Stirone v. United States*, 361 U.S. 212, 215, 80 S.Ct. 270, 272, 4 L.Ed. 252 (1960), this Court stated that the Hobbs Act:

---

[10]*Cf. United States v. Archer*, 486 F.2d 670, at 678 (2d Cir. 1973): "Federal auxiliary criminal jurisdiction" has spread to the point where "[t]here is practically no offense within the purview of local law that does not become a Federal crime if some distinctive Federal involvement happens to be present." See N. Abrams, Consultant's Report on Jurisdiction, 1 Working Papers of the National Commission on Reform of Federal Criminal Laws, 33, 36 (1970).

[11]Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Georgetown L. J. 1171, at 1172 (1977).

> speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. . . . *It was to free commerce from such destructive burdens that the Hobbs Act was passed.*

Citation omitted; emphasis added; cited with approval in *Evans v. United States*, ____ U.S. ____, at ____, n. 12, 112 S.Ct. 1881, at 1883, n. 12, 119 L.Ed.2d 57 (1992).

While protection of commerce is the purpose of the Hobbs Act, the involvement of commerce is the foundation of the Act. As described by this Court in *Stirone:*

> there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical *since the Federal Government's jurisdiction of this crime rests only on that interference.*

Stirone, supra, 361 U.S. at 218, 80 S.Ct. at 274, 4 L.Ed.2d 252; emphasis added[12].

[12]Without the requisite nexus to interstate commerce, the conduct proscribed by the statute is the common law offense of extortion. "[M]ost federal criminal statutes founded on the movement of persons or things in interstate commerce duplicate in some fashion state criminal statutes applicable to the same underlying activity." Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Georgetown L. J. 1171 (1977), at 1209.

From early on it has been held that there are no common law offenses against the United States. *United States v. Hudson and Goodwin*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812); *United States v. Coolidge*, 1 Wheat. 415, 4 L.Ed. 124 (1816); *cf.* 1 Moore's Federal Practice ¶0.62[1] (1991 ed.).

Where is the interstate commerce element?

Where is the essential element of interstate commerce in this case? At trial, the government alleged that it was the prostitution business itself which constituted interstate commerce. The trial judge so instructed the jury. However, this particular type of commerce is itself an offense against the laws of the United States which is proscribed by the Mann Act, 18 U.S.C. §§2421-2424[13]. When the prosecution and the trial judge so framed the essential commerce clause element in this trial, they set up a direct conflict between the Hobbs Act and the Mann Act, both of which derive their jurisdictional base from the Commerce Clause, and both of

[13]No allegation was made that any lawful business was transacted from the massage parlor-prostitution enterprises. The prosecution characterized them as "illegal." The prosecution's theory of the case was that the brothels were businesses in interstate commerce and that the prostitution enterprise supplied the requisite nexus to interstate commerce to "federalize" the alleged extortionate behavior. The prosecution elicited tesimony as to the interstate aspects of the prostitution enterprises, and the court charged the jury accordingly.

In addition to instructing the jury that the named prostitution enterprises were claimed to be businesses in interstate commerce (April 28 TR. at 127), the court included a charge on the "right to conduct a business", meaning the prostitution business (Jury Charge, April 28, 1992, TR. 124). His charges also included as evidence of interstate commerce acts which constitute violations of the Mann Act and the Travel Act.

Affecting interstate commerce plays a triple role here: (1) it is the basis of jurisdiction; (2) it is an essential element of the offense; and (3) it was an essential component of the jury instructions. On the specific facts of this case, no lawful business was alleged in any of the three, nor any effect on any legal commerce.

Petitioner Luong assumes that the narrower issue of how the interstate commerce issue was applied in his case, as to jurisdiction, element of the offense, and jury instructions, is subsumed in the broader issue presented in the body of the petition.

which were enacted to protect commerce from unlawful uses.

Categorizing a prostitution enterprise as interstate commerce for jurisdictional purposes conflicts with applicable decisions of this Court

This Court upheld the Mann Act as valid legislation to "keep the channels of interstate commerce free from immoral and injurious uses" in *Caminetti v. United States*, 242 U.S. 470, 491, 37 S.Ct. 192, 197, 61 L.Ed. 442 (1917). The prostitution enterprises which are alleged to constitute interstate commerce for jurisdictional and Hobbs Acts purposes constitute offenses against the laws of the United States, including offenses under the Mann Act, 18 U.S.C. §2421 *et seq.*, offenses under the Travel Act, 18 U.S.C. §1952, and offenses under RICO, 18 U.S.C. §1961 *et seq.*

The lower courts' upholding of this jurisdictional base ignores all of this Court's pronouncements on interstate commerce. It both disregards this Court's decision in *Caminetti* and sets up a direct conflict between two statutes of equal rank, the Mann Act and the Hobbs Act, and a conflict in the jurisprudence interpreting these two acts. What is proscribed as an unlawful interference with commerce by the Mann Act has been characterized by the courts below as the very element of interstate commerce which the Hobbs Act protects from extortion.

This Court should grant certiorari to correct both the disregard of clear precedent and the trend toward unwarranted federal prosecutions on erroneous assumptions of jurisdiction.

Whether purely illegal activity, not associated with lawful enterprises, can constitute interstate commerce under the Hobbs Act is a question of first impression and an issue which should be resolved by this Court

The precise issue before this Court appears to be one of first impression. Petitioner's research has not uncovered any other case which has considered or decided the issue in this case, —whether illegal activity fitting the definition of a RICO criminal enterprise can constitute commerce for Hobbs Act jurisdictional purposes[14].

Some of the circuit courts of appeal have upheld Hobbs Act convictions when the jurisdictional base was lawful commercial activity tainted with illegal activity. The Seventh Circuit is one of these. It requires a nexus between the extortionate conduct alleged and interstate commerce.

The seminal case in the Seventh Circuit is *United States v. Blakey*, 607 F.2d 779 (7th Cir. 1979), in which the defendants were Chicago police officers convicted of Hobbs Act violations as a result of evidence obtained during an investigation of police corruption. Noting *id.* at 783 that: *"no authority indicates whether the Hobbs Act applies to wholly illegal businesses"* (emphasis supplied), the court did not address that question because the business involved had "a legitimate facet". *Id.* The court stated: "the presence of some illegality in the victimized business does not *per se* remove it from the Act's coverage." Id. The Seventh Cir-

[14]*United States v. Hanigan*, 681 F.2d 1127 (9th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983), is a case where egregious facts led to an erroneous holding. Although the Ninth Circuit upheld a Hobbs Act conviction on an erroneous jurisdictional base, *Hanigan* did not involve "business" or extortion.

cuit's holding that some illegal activity will not suffice to eradicate the jurisdictional base of "commerce" implicitly recognizes that pure illegality untainted by legitimate business does not constitute commerce and does not supply jurisdiction.

The Sixth Circuit reversed a Hobbs Act conviction for robbery of a K-Mart business in *United States v. Yokley*, 542 F.2d 300 (6th Cir. 1976). The court noted that upholding defendant's conviction under the Hobbs Act would make any armed robbery, traditionally a state offense, a federal crime:

> This interpretation and application of §1951, as urged by the Government, would encompass literally any armed robbery occurring in any state. Accordingly, under the de minimus interstate commerce rule, the robbery of a corner grocery store, pharmacy or gasoline service station, without more, would be a federal offense. . . . If the time ever comes when Congress desires to expand federal criminal jurisdiction to include all armed robberies having any effect on interstate commerce, no matter how small, more specific language than the broad general provisions of the Hobbs Act will be necessary.

Yokley at 304-305. Congress has failed to express any such desire to so expand federal criminal jurisdiction. *Cf. United States v. Enmons*, 410 U.S. 396, 412, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973):

> Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress

> intended to work such an . . . unprecedented incursion into the criminal jurisdiction of the States.

This issue of first impression is an important one. If this Court fails to address it, it will likely recur in future prosecutions, resulting in the waste of judicial, economic, and temporal resources. The jurisdictional question is clear-cut; no further elaboration by the inferior courts is necessary before it is ripe for decision by this Court.

The decision below so far departs from the accepted and usual course of judicial proceedings, including the applicable decisions of this Court, as to call for the exercise of this Court's power of supervision

Decisions of this Court interpreting the Commerce Clause and statutes passed pursuant thereto are not among the lesser known opinions of the Court. In *Gibbons v. Ogden,* 22 U.S. 1, 9 Wheat. 1, 6 L.Ed. 23 (1824), Chief Justice Marshall wrote of "commerce": "it becomes necessary to settle the meaning of the word." The "meaning of the word", at least in the context of whether it is interstate commerce subject to Congressional regulation, has been litigated from that time forward.

A "giant among giants" in the upholding of Congress' expansion of interstate commerce jurisdiction is *Heart of Atlanta Motel v. United States,* 379 U.S. 241, 85 S.Ct. 348 (1964), upholding the Civil Rights Act of 1964 as a valid exercise of the power to regulate interstate commerce. The *Heart of Atlanta* decision draws the following conclusion from its analysis of *Gibbons v. Ogden:*

> In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more States than one" *and has a real and substantial relation to the national interest.*

Heart of Atlanta Motel, supra, at 255, 85 S.Ct. at 356; emphasis added.

It cannot be contended that prostitution enterprises have "a real and substantial relation to the national interest." In addition to the impossibility of brothels' meeting this standard, characterizing the RICO enterprise-prostitution activities as businesses in interstate commerce shows just how far afield the concept strayed in the matter under review.

Heart of Atlanta catalogues some of the moral-purpose or societal interest legislation enacted pursuant to the power to regulate commerce:

> The same interest in protecting interstate commerce which led Congress to deal with segregation in interstate carriers and the white-slave traffic has prompted it to extend the exercise of its power to gambling, Lottery Case (Champion v. Ames), 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903); to criminal enterprises, Brooks v. United States, 267 U.S. 432, 45 S.Ct. 345, 69 L.Ed. 699 (1925); to deceptive practices in the sale of products, Federal Trade Comm. v. Mandel Bros., Inc., 359 U.S. 385, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); to fraudulent security transactions, Securities & Exchange Comm. v.

> Ralston Purina Co., 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 (1953); to misbranding of drugs, Weeks v. United States, 245 U.S. 618, 38 S.Ct. 219, 62 L.Ed. 513 (1918); to wages and hours, United States v. Darby, 312 U.S. 100, 657, 61 S.Ct. 451, 85 L.Ed. 690 (1941); to members of labor unions, National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937); to crop control, Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); to discrimination against shippers, United States v. Baltimore & Ohio R. Co., 333 U.S. 169, 68 S.Ct. 494, 92 L.Ed. 618 (1948); to the protection of small business from injurious price cutting, Moore v. Mead's Fine Bread Co., 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145 (1954); to resale price maintenance, Hudson Distributors, Inc. v. Eli Lilly & Co., 377 U.S. 386, 84 S.Ct. 1273, 12 L.Ed. 2d 394 (1964), Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951); to professional football, Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957); and to racial discrimination by owners and managers of terminal restaurants, Boynton v. Com. of Virginia, 364 U.S. 454, 81 S.Ct. 182, 5 L.Ed.2d 206 (1960).

Heart of Atlanta Motel, supra, at 256-257, 85 S.Ct. at 357.

It is an affront to any serious scholar of constitutional law to have the government advance the contention that a totally illegal enterprise, whose principal product was prostitution, constitutes interstate commerce for federal jurisdictional purposes. Such a serious departure from reasoned and principled procedure, sanctioned by a Circuit Court of Appeals,

should be corrected by the exercise of this Court's power of supervision.

The decision below departs from decisions of this Court, rejects the rule of lenity, and violates principles of federalism

This Court again construed the reach of the Hobbs Act in *United States v. Enmons*, 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973), stating at 411-412, 93 S.Ct. at 1015-1016:

> First, this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity. United States v. Wiltberger, 5 Wheat. 76, 95, 5 L.Ed. 37; United States v. Halseth, 342 U.S. 277, 280, 72 S.Ct. 275, 276, 96 L.Ed. 308; Bell v. United States, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905; Arroyo v. United States, 359 U.S. 419, 424, 79 S.Ct. 864, 867, 3 L.Ed. 2d 915; Rewis v. United States, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493. Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. *Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.* [Emphasis added; citations omitted.]

As we said last Term:

"*[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.* Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." United States v. Bass, 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed. 448 (footnotes omitted).

Emphasis added.

Enmons makes two points pertinent to the matter before the Court. First, where the facts alleged to support subject matter jurisdiction are not clearly within the contemplation of the congressional purpose and intent, the analysis reverts to the rules of statutory construction requiring strict construction of criminal statutes and invoking the "rule of lenity". *Enmons, supra,* at 411, 93 S.Ct. at 1015, and cases cited therein; *Rewis v. United States,* 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971); *United States v. Bass,* 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed. 448 (1971); *Gregory v. Ashcroft,* 501 U.S. ____, ____, 111 S.Ct. 2395, 2401, 115 L.Ed.2d 410 (1991); *cf. Evans v. United States,* ____ U.S. ____, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992), dissenting opinion at 112 S.Ct. 1900-1902; *see also United States v. Yokley,* 542 F.2d 300 (6th Cir., 1976), at 304-305; *United States v. Archer,* 486 F.2d 670, 680 (2d Cir. 1973); *United States v. Wander,* 601 F.2d 1251 (3 Cir. 1979). Second, where assumption of federal jurisdiction will overlap

and possibly usurp local jurisdiction, issues of federalism arise, invoking policy considerations.[15]

While it would appear to petitioner that it is clear that subject matter jurisdiction was not intended or present in this case, should there be any doubt, the rule of lenity should be invoked and the construction should be against finding jurisdiction. These principles clearly were neither applied nor followed by the courts below. This departure is significant enough to warrant correction by this Court.

Second, the decision below represents a major usurpation of state criminal jurisdiction. The only acts which concerned any jurisdiction other than the state of Pennsylvania's were acts committed by the prosecution's witnesses, not by the defendants. Such an incursion by the United States Attorney's Office into purely local matters should not go uncorrected by this Court due to the propensity for repetition.

Arbitrary, discriminatory, impermissibly selective prosecution occurred to petitioner's detriment due to the government's abuse of discretion and abuse of power of the office[16]

The lengthy trial below developed the following scenario. On one hand were the defendants, minor players, whose

[15]Excellent analyses of federalism issues and policy considerations are found at: *Rewis v. United States*, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971); *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973); *United States v. Wander*, 601 F.2d 1251 (3d Cir. 1979); Friendly, Federal Jurisdiction: A General View (1973); and Ruff, *supra*, 65 Georgetown L.J. 1171 (1977).

[16]This aspect of the jurisdictional argument was subsumed in petitioner's jurisdictional issue on appeal to the Third Circuit; it was discussed in his brief on appeal at 21.

actions may or may not have constituted violations of state criminal laws. On the other hand were the prosecution witnesses, the two madams, who testified that they violated provisions of the Internal Revenue Code, of the Mann Act, of the Travel Act, and of the RICO statutes. Their testimony alluded to other possible violations of federal laws.

Salient questions recur throughout a review of the proceedings below:

- Why was petitioner prosecuted in federal court?
- Why was the case brought against the defendants rather than against the prosecuting witnesses?
- What informed the prosecutorial discretion exercised in selecting petitioner for prosecution while immunizing the madams who conducted the prostitution enterprises?

This Court has held:

> although prosecutorial discretion is broad, it is not " 'unfettered.' Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints." *United States v. Batchelder,* 442 U.S. 114, 125, 99 S.Ct. 2198, 2205, 60 L.Ed.2d 755 (1979) (footnote omitted).

Wayte v. United States, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985). See also the observations of Justice Marshall, dissenting opinion *id.* at 614, 105 S.Ct. at 1534:

> If the Government intentionally discriminated in defining the pool of potential prosecutees, it cannot immunize itself from liability merely by showing

> that it used permissible methods in choosing whom to prosecute from this previously tainted pool. Cf. *Connecticut v. Teal*, 457 U.S. 440, 450-451, 102 S.Ct. 2525, 2532-2533, 73 L.Ed.2d 130 (1982).

Id. at 630, 105 S.Ct. at 1542. Justice Marshall further pointed out that in the "seminal selective prosecution decision", *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), "the Court properly focused on the official action that led to those prosecutions." *Id.*

Issues of abuse of prosecutorial discretion and of federalism have been discussed together by leading jurists of two of the circuit courts of appeal, Judge Aldisert in *United States v. Wander*, 601 F.2d 1251 (3 Cir. 1979), concurring and dissenting opinion at 1263, and Judge Friendly in *United States v. Archer*, 486 F.2d 670 (2 Cir. 1973)[17].

In his concurring and dissenting opinion in *United States v. Wander, supra*, Judge Aldisert analyzed federalism concerns and issues of prosecutorial discretion, stating:

[17]In *Archer*, Judge Friendly wrote:

> [W]e are not prepared to say that, absent Congressional limitation, a federal court may never dismiss a prosecution as an abuse of federal power, ... However, we find it unnecessary to decide whether we have such a power or should exercise it here, since we hold these convictions must be reversed on another, although not unrelated, ground.

United States v. Archer, 486 F.2d 670, at 678 (2 Cir. 1973). The ground for reversal was the prosecution's failure to persuade the court that the requisite nexus to interstate commerce existed; therefore, the court held that there was not subject matter jurisdiction.

Judge Friendly wrote extensively on the subject in Friendly, Federal Jurisdiction: A General View (1973).

> If the unlawful activity involves use of interstate facilities by the principals on such a scale that local investigation and prosecution would be ineffective, then in may be concluded that a federal interest is implicated.

601 F.2d at 1267.

No such federal interest was implicated in the prosecution of petitioner. Indeed, the facts adduced below show the reverse side of the coin. It was the activity of the *prostitution businesses* which involved large-scale use of interstate facilities. *Cf.* the second factor discussed by Judge Aldisert:

> The second factor is the capacity of the local prosecutor, with or without federal assistance, to investigate and prosecute effectively. This may be considered a corollary of the first, and implicates the quality and quantity of interstate contacts associated with what would otherwise be a purely local matter. It would include consideration of the problems of venue, expense, extradition, and any practical difficulties which might be encountered by a local authority in extending its investigative arm beyond state lines.

Wander, id. at 1267-1268.

By stipulation, it was introduced at trial that the local prosecutor was *quite* capable of investigating and prosecuting local misconduct: it was stipulated that petitioner Luong was convicted in the Court of Common Pleas of attempted extortion at the Lilly Chau Restaurant. From all indications,

the Lilly Chau club was a legitimate business (restaurant and nightclub) which could easily have met the jurisdictional requirements of the Hobbs Act. Yet this prosecution was in state court.

On the other hand, local officials would likely have encountered difficulties in "extending" their "investigative arm beyond state lines" in investigating and prosecuting the prostitution-related criminal enterprises run by the prosecution witnesses. Local officials certainly are without authority to prosecute for violations of the Internal Revenue Code, the Mann Act, the Travel Act, and the RICO statutes. It is, therefore, a puzzling anomaly, at least on this record, that the prosecutorial discretion was exercised to prosecute the defendants rather than the madams-turned-prosecution witnesses and their racketeering enterprise prostitution establishments.

Indeed, prostitution and extortion are contained in the same classification of offenses constituting racketeering activity. 18 U.S.C. §1961. Both prosecution witnesses-madams testified that they began cooperating with the government pursuant to plea bargains pertaining to their bribery of I.R.S. agents. The record below establishes that they committed offenses against the tax laws of the United States and continued to avoid paying taxes[18]; that their prostitution businesses violated most, if not all, of the Mann Act provisions; and that they may have been involved in violations of other federal laws, including immigration laws. The prosecutorial determination to name the madams as the "victims" of possible extortion rather than as defendants in any of these admitted violations is troublesome.

[18]April 13 TR. at 96-98, 125-127.

The concept has been troublesome to the circuit courts of appeal, as well. *United States v. Redondo-Lemos,* 955 F.2d 1296 (9 Cir. 1992), raised issues of "unconstitutionally selective prosecution", *id.* at 1298, and of selecting from a "class" of "defendants who were equally culpable", *id. United States v. Archer,* 486 F.2d 670 (2 Cir. 1973), discussed the possibility of dismissing "a prosecution as an abuse of federal power", id. at 678, but found it unnecessary to decide since it held that the requisite nexus to interstate commerce did not exist and that, therefore, there was not subject matter jurisdiction.

Should this Court decide to validate the Third Circuit's implicit finding of federal jurisdiction on the facts of the case at bar, then petitioner Luong asserts that the issue of unconstitutionally selective and arbitrary prosecution, selecting to prosecute him as a lesser culpable defendant than the immunized prosecution witnesses, both of whose alleged offenses were in the same category of offense and culpability in the United States Code, is ripe for review[19].

---

[19]It is appropriate to repeat the caution expressed by Judge Aldisert in *Wander:*

I believe the federal courts also have a profound responsibility .... It is one thing for the executive branch, through an eager government agent or young assistant United States Attorney, to find a case sufficiently newsworthy to demonstrate the diligence of the federal prosecutor's office; it is quite another thing for the judiciary, under less political pressure and with all-pervasive accountability, to affix the imprimatur of binding precedential significance that will have weighty consequences beyond the individual case. This is precisely what the Supreme Court meant when it alluded to federal prosecution that "would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well ... transform relatively minor state offenses into federal felonies." *Rewis, supra,* 401 U.S. at 812, 91 S.Ct. at 1059.

Wander, supra at 1268.

Should this Court grant certiorari to correct one aberrant decision on jurisdiction?

Yes. An issue of jurisdiction *ratione materiae*, subject matter jurisdiction, is always an important one. In addition to the traditional reasons enumerated in Rule 10 for granting certiorari, the erroneous decision below is unlikely to remain a lone aberrant one. The question is important to future prosecutions. If this Court does not grant certiorari and correct the error below, it is likely that U.S. Attorneys will begin to bring prosecutions under the Hobbs Act rather than under the RICO statutes, which require more extensive proof.

The guidance of this Court is appropriate in this arena. This matter does call for an exercise of this Court's power of supervision.

Conclusion

Petitioner was tried, convicted, and sentenced by a court which did not have subject matter jurisdiction. No interstate commerce was involved; therefore, prosecution under the Hobbs Act was not proper. There was no offense against the United States.

Prostitution enterprises, which meet the statutory definition of RICO criminal enterprises, and which involve no lawful commercial activity, do not rise to the level of interstate commerce subject to regulation and protection by the United States government.

This Court has a long and noble tradition of upholding the sovereignty of the nation while developing a carefully

crafted body of jurisprudence interpreting the Commerce Clause to the Constitution of the United States. Into this great tradition respondent would inject criminal enterprises, all of whose "business" purposes are made offenses against the United States under the very Commerce Clause which respondent would use to define these criminal enterprises as commerce to be protected with all the sovereigny of the United States. To abrogate the meaning of commerce as that term has been defined "going back almost to the founding days of the Republic"[20] is a travesty to which this honorable Court simply must not succumb.

Petitioner Luong respectfully requests that this honorable Court grant his petition and grant certiorari.

Respectfully submitted,

s/J. DONICE ALVERSON
J. DONICE ALVERSON
Counsel of Record
650 Poydras Street
Suite 2700
New Orleans, Louisiana 70130
504-524-7603

---

[20]*Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964).

APPENDIX A—Judgment Order of the United States Court of Appeals for the Third Circuit, *United States v. Luong*, No. 92-1907, February 23, 1994

No. 92-1907

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

STEVEN LUONG, a/k/a "Small Eyes",

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Criminal No. 91-00119-03)
District Judge: Honorable Lowell A. Reed, Jr.

ARGUED: JANUARY 19, 1994

BEFORE: SLOVITER, Chief Judge,
SCIRICA and LEWIS, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by the appellant as well as those raised by his co-appellants which the

appellant has adopted pursuant to Fed. R. App. P. 28(i), specifically that the district court erred by:

1. Exercising jurisdiction over this case;

2. Admitting evidence of the Lilly Chau incident;

3. Admitting evidence regarding the defendants' and their associates' possession of firearms and drugs; the presence of firearms on the premises of the victims of the alleged extortion; references to "gangs", organized crime and threats; and an alleged assault upon one of the victims of the alleged extortion;

4. Permitting Pennsylvania Crime Commission agent Edward Recke to testify regarding statements Oe Pok Spencer made to him;

5. Permitting the extortion victims to explain their understanding of the defendants' statements in tape-recorded conversations;

6. Refusing to declare a mistrial;

7. Permitting government witnesses to commit perjury;

8. Failing to dismiss the case because of prosecutorial misconduct;

9. Failing to overturn the verdict because of insufficiency of the evidence;

10. Finding that the loss suffered by the extortion victims totaled $191,900 for sentencing purposes;

11. Applying a victim-related adjustment when determining the applicable Guidelines offense level;

12. Refusing to depart downward from the Guidelines imprisonment range due to overcrowded prison conditions;

13. Increasing his offense level because a firearm was discharged during the commission of the crimes of which he was convicted; it is

ADJUDGED AND ORDERED that the judgment of the district court dated and filed on October 20, 1992, and entered on April 9, 1993, be and is hereby AFFIRMED.

BY THE COURT:
(illegible) LEWIS
Circuit Judge

Attest:

s/P. DOUGLAS (illegible)
Clerk
Date: Feb 23 1994

Certified as a true copy and issued in lieu
of a formal mandate on March 17, 1994

Teste: s/P. DOUGLAS (illegible)

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX B—Judgment and Commitment Order, Eastern District of Pennsylvania, *United States v. Luong*, Docket No. 91-119-03, filed October 20, 1992; entered April 9, 1993.

44280-066

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

v.

STEVEN LUONG.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: CR. 91-119-03

WILLIAM T. CANNON, ESQUIRE
Defendant's Attorney

The defendant was found guilty on count(s) 1, 2 and 4 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:1951	Extortion Conspiracy.	November, 1990.	Ct. 1
18:1951	Extortion.	November, 1990	Ct. 2
		January, 1990.	Ct. 4

The Defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay a special assessment of $150.00, for count(s) 1, 2 and 4, which shall be due as follows: within one (1) year of today's date. Interest shall apply.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: none.
Defendant's Date of Birth: April 7, 1969

Date of Imposition of Sentence: October 20, 1992

s/LOWELL A. REED, JR.

LOWELL A. REED, JR.
U.S. District Judge

Date: 4-8-93

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term

of one-hundred twenty (120) months as to counts 1, 2 and 4 to run concurrently with each other.

The court makes the following recommendations to the Bureau of Prisons: that the defendant be incarcerated in a federal prison nearest to the place of residence to his parents.

The defendant is remanded to the custody of the United States marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years to commence upon his release from incarceration.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled

substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDENDUM OF ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. Defendant shall observe the standard conditions of supervised release of the Eastern District of Pennsylvania.

2. Defendant shall not possess any firearms or other dangerous weapons.

3. Probation Office shall make all reasonable efforts both financial and otherwise to provide an educational program and vocational program for defendant and it should include a program for either learning the English language or upgrading his skills that he might be lucky enough to secure while he is in prison.

4. If Mr. Luong, during the period of supervised release is able to secure employment, that he shall provide all financial information he has to the probation officer at the request of the Probation Office, and provide to the probation officer copies of his personal federal, state, and local income tax returns, within thirty (30) days of filing said returns.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except: Paragraphs 29 through 31 inclusive be stricken as to this defendant from this defendant's Presentence Report. Also, the line in paragraph 32 referring to the loss to Ms. Pak of $8,000.00. Paragraph 53- should read: "On January 15, 1991, the defendant was adjudged guilty and was . . ."

Guideline Range Determined by the Court:

Total Offense Level: 28

Criminal History Category: IV

Imprisonment Range: 110 to 137 months

Supervised Release Range: 2 to 3 years

Fine Range: $12,500 to $125,000

Fine is waived or is below the guideline range, because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

ADDENDUM TO STATEMENT OF REASONS

Because the guideline range is more than twenty-four (24) months, I find no reason to sentence Steven Luong at the top of the guideline range since most of the traditional aggravating factors so to speak for the general sentencing have been attended to in the guidelines themselves and it would be inappropriate to consider those factors. I am aware that he was a soldier in this group of men who carried out these very serious crimes and there is no possible basis for me to sentence him at the bottom of the guidelines because deterrence and punishment and really incapacitation are the major reasons for a sentence that is substantial and in the middle of the guidelines. I find no basis for leniency. If there is any factor beyond what I already stated, it would be

the violence involved here, or the incipient violence that had not been attended to, but I do not give that double the consideration. But the over all general violence of the crimes in which he has been charged in counts 1, 2 and 4 persuade me to be well above the bottom of the guideline or make me conclude that the sentence should be well above the bottom of the guidelines.

A True Copy Certified to From the Record:
Dated: April 8, 1993
Attest: HARRY E. GRACE
Deputy Clerk, United States District Court
Eastern District of Pennsylvania

APPENDIX C—Unpublished Opinion of the United States Court of Appeals for the Third Circuit in *United States v. Lu*, No. 92-1797, consolidated appeals of co-defendants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARGUED JANUARY 19, 1994

BEFORE: SLOVITER, Chief Judge,
SCIRICA and LEWIS, Circuit Judges.

(Filed MAR 23 1994)

(D.C. Criminal No. 91-00119-01)
(D.C. Criminal No. 91-00119-02)
(D.C. Criminal No. 91-00119-04)

OPINION OF THE COURT

LEWIS, *Circuit Judge*.

Appellants were convicted of violating and conspiring to violate the Hobbs Act, 18 U.S.C. § 1951, by extorting "protection money" from the proprietors of three brothels in the Chinatown area of Philadelphia. During sentencing, the district court increased each of their offense levels by two because it found that "there was significant bodily injury to the victims and their customers." Appendix at 55; *see also*

app. 66, 76. We will reverse and remand for further proceedings in accordance with this opinion.[1]

I.

The extortion which was alleged and which the government proved in this case occurred at the Red Dragon Mas-

[1]Appellants raise several other issues both individually and by reference pursuant to Fed. R. App. P. 28(i). Specifically, they, through counsel and in a *pro se* supplemental submission filed by appellant Lu, claim that the district court erred by: (1) exercising jurisdiction over a case involving alleged violations of the Hobbs Act when the interstate commerce affected by the alleged extortion facilitated an illegal business; (2) exercising jurisdiction over a case over which it otherwise lacked subject matter jurisdiction; (3) denying Lu's and Ngu's motions for severance; (4) admitting evidence of the Lilly Chau incident; (5) admitting evidence regarding the defendants' and their associates' possession of firearms and drugs; the presence of firearms on the premises of the victims of the alleged extortion; references to "gangs", organized crime and threats; and an alleged assault upon one of the victims of the alleged extortion; (6) permitting Pennsylvania Crime Commission agent Edward Recke to testify regarding statements Oe Pok Spencer made to him; (7) permitting the extortion victims to explain their understanding of the defendants' statements in tape-recorded conversations; (8) refusing to declare a mistrial; (9) permitting government witnesses to commit perjury; (10) failing to dismiss the case for prosecutorial misconduct; (11) failing to overturn the verdict because of insufficiency of the evidence; (12) finding that the loss suffered by their victims totaled $191,900 for sentencing purposes; (13) applying a victim-related adjustment to their sentences; (14) refusing to depart downward from the Guidelines imprisonment range due to overcrowded prison conditions; (15) increasing their offense levels because a firearm was discharged during the commission of the crimes of which they were convicted; and (16) increasing Lu's and Ngu's offense levels because of their positions as leaders or organizers of the criminal activity in question. After careful review, we find no error and affirm as to all these asserted grounds for appeal.

sage Parlor, the Dynasty Massage Parlor and a similar establishment named Physical Therapy in Chinatown. Both the proprietor of Dynasty, Ok Sim Kim, and the manager of the Red Dragon and Physical Therapy, Oe Pok Spencer, testified for the government at trial. Each testified to an incident or incidents upon which the government seeks to base the increase in appellants' offense levels for "bodily injury."

At the Red Dragon, Spencer testified that appellant Tien Tuan Ngu struck customers while initially trying to convince her to succumb to his extortion demands. App. at 1500, 1800. Appellants' presentence reports state, and they have not disputed, that during the time preceding Spencer's agreeing to pay, "it was not uncommon for Dai Quoc Lu and Tien Tuan Ngu to physically strike customers and verbally harass the female employees." Presentence reports ¶ 14.

At Dynasty, Kim testified that Ngu once attacker her. *See* presentence reports ¶ 28. Specifically, the relevant exchange between Kim and the prosecutor at trial went as follows:

> [U.S. Atty.]: Now, you were asked whether the defendants treated you with politeness. Was there ever a time when [Ngu], in particular, treated you in a very mean and nasty fashion?
>
> * * *
>
> [Kim]: Yes.
>
> * * *
>
> [U.S. Atty.]: Would you explain to the jury, pick any instance, when . . . as you've just indicated,

> [Ngu] was nasty to you and explain to the jury what happened in that instance.
>
> * * *
>
> [Kim]: One day, [Ngu] tried to touch my body around, so, I said, I didn't like it and I became angry. . . . And he became angry and said something in Chinese and told me, he would beat me up. At that time, when he attempted to hit me, I suddenly sank down on the floor. That's why I was able to avoid from being hit. At that time, I was wearing a one-piece dress, at that time, my dress was torn off. And then I went to my room and I cried . . . .

App. at 1262-63.

II.

Based on this evidence, appellants William Ho, Lu and Ngu each were accorded a two-level increase in their offense levels because the district court found that at least one victim of their crimes had sustained "significant bodily injury."

The district court exercised jurisdiction over this case pursuant to 18 U.S.C. § 3231; we have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Because the issue before us concerns possible increases to offense levels, we must determine whether the government has borne its burden of proving applicability of the adjustments by a preponderance of the evidence. *United States v. McDowell*, 888 F.2d 285, 290 (3d Cir. 1989). Our standard of review is plenary as to interpretation of the United States Sentencing Guidelines (the "Guidelines") but clearly erroneous as to

factual findings. *United States v. Bierley,* 922 F.2d 1061, 1064 (3d Cir. 1990).

III.

Guidelines § 283.2(b)(3) (1992) provides for an increase in an extortion defendant's offense level "[i]f any victim sustained bodily injury." Application note 1 refers a court attempting to interpret the phrase "bodily injury" to Guidelines § 1B1.1, which defines it as "any significant injury; *e.g.* an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought."[2]

---

[2]In 1990, when the criminal activity at issue in this case occurred, application note 1 did not direct a reader to § 1B1.1 for a definition of the term "bodily injury;" it first did so in the version of the Guidelines which became effective on November 1, 1991. Nevertheless, use of this definition conforms with our general rule of applying the version of the Guidelines in effect on the date appellants were sentenced except when doing so raises concerns of *ex post facto* application. 18 U.S.C. § 3553(a)(4); Guidelines § 1B1.11(a), policy statement; *United States v. Kopp,* 951 F.2d 521, 526 (3d Cir. 1991). No *ex post facto* problem arises here because, even assuming that the use of the definition somehow operates to the appellants' detriment, § 1B1.1 has always defined the term "bodily injury" in the same manner; the only change engendered by the 1991 amendment to § 2B3.2, application note 1, was an explicit reference to that definition. *See generally United States v. Ofchinick,* 877 F.2d 251, 257 n.9 (3d Cir. 1989) (when amendments are intended merely to clarify an existing guideline rather than to substantively change it, we accord them substantial weight); *see also Kopp,* 951 F.2d at 526 n.8 (application of later amendments when they are merely "editorial" "raises no *ex post facto* concerns").

The district court did not explicitly address this definition either during oral argument regarding the appellants' sentences or when issuing its Guidelines findings. Instead, in its findings, the court merely stated "that the government has proved by a preponderance of the evidence that there was significant bodily injury to the victims and their customers in connection with each of the two conspiracies." Addenda to judgment and conviction orders at ¶ 9. We have before us, however, no analysis as to how the scant evidence recited above supports a finding that any of the appellants or their colleagues caused injuries falling within the same category as those that are "painful and obvious" or "of a type for which medical attention ordinarily would be sought."

Moreover, it is apparent to us that, even according the government all permissible inferences from the record, a two-level increase based solely upon the above-recited evidence would be unwarranted. One court has ruled that to be "significant," as is required in the Guidelines definition of "bodily injury," "an injury need not interfere completely with the injured person's life but cannot be wholly trivial and, while it need not last for months or years, must last for some meaningful period." *United States v. Lancaster,* 6 F.3d 208, 209 (4th Cir. 1993) (affirming a district court's determination that a defendant who sprayed mace into a security guard's eyes, causing severe burning and necessitating a visit to an optometrist, had not caused "bodily injury"). We are reluctant to adopt a hard-and-fast rule for defining "bodily injury" within the meaning of the Guidelines, for determining whether it occurred is "a very factually-specific inquiry which takes into account a multitude of factors," *Lancaster,* 6 F.3d at 210, and is best left to the district court, which is normally far better suited for such determinations than a court of appeals. Nevertheless, some

content is required to give meaning to §1B1.1's definition of the phrase "bodily injury." *See United States v. Lanzi*, 933 F.2d 824, 827 (10th Cir. 1991) (even assuming that psychological injury can constitute "bodily injury," evidence that the bank teller victim of a robbery had attended one counseling session and had changed occupations after the robbery did not suffice).

The search for such objective indicia reveals that neither category of evidence advanced in support of the enhancement comport with a finding that victims sustained "significant injury" in this case. Kim's testimony about Ngu's alleged assault upon her surely cannot do so, for she testified that she was not actually struck.[3] Similarly, Spencer's testimony and the presentence reports' statements that Ngu, and possibly Lu, physically struck customers and verbally harassed female employees do not support a finding that the customers or employees suffered "bodily injury" as defined in § 1B1.1. The government argues that the district court could have inferred such injury from Spencer's statement at trial that Ngu's actions drove both customers and employees away. *See* app. at 1500. On this record, however, such an inference would constitute mere speculation: while it may be that customers and employees departed because they had suffered "painful and obvious" injuries, injuries for which they would seek medical attention, or other injuries falling into the same category, the government has failed to identify objective evidence to support that far-reaching inference. It could just as easily be that customers

---

[3]Although mentioned before the district court, the government has not argued on appeal that psychological injury can constitute "bodily injury" within the meaning of § 2B3.2(b) (3). *See United States v. Lanzi*, 933 F.2d 824, 827 (10th Cir. 1992) (assuming without deciding that it can).

and employees of the Red Dragon decided to leave because Ngu had frightened them.

It is thus apparent that this case is a far cry from those reported decisions in which courts of appeals have affirmed district court determinations that victims had suffered "bodily injury" within the meaning ascribed to that term in the Guidelines. In *United States v. Isaacs*, 947 F.2d 112 (4th Cir. 1991), for example, the court affirmed such a finding when it was supported by evidence that the victim had described himself as having "had the [expletive] slapped out of me," that the victim's face was red and appeared puffy and that the victim stated that his ear was ringing as a result of the defendant's blow. *Issacs*, 947 F.2d at 114. Similarly, in *United States v. Muhammad*, 948 F.2d 1449 (6th Cir. 1991), the court affirmed a district court's enhancement of a defendant's offense level for "bodily injury" when the defendant had beaten and kicked a police officer, causing numerous abrasions, hyperextension of a shoulder and soreness that lasted two weeks. *Muhammad*, 948 F.2d at 1456. Even assuming that victims of appellants' crimes suffered injury, the two scenarios which the government has relied upon provide no objective indication that those injuries were "significant" so as to constitute "bodily injury" for Guidelines purposes. *See also United States v. Hamm*, 1994 WL 7455 (7th Cir. 1994) (enhancement for "bodily injury" proper when victim suffered bumps and bruises, "had the wind knocked out of him" and sustained a back injury requiring chiropractic treatment); *United States v. Greene*, 964 F.2d 911 (9th Cir. 1992) (enhancement proper when bank teller was slapped twice in the face with blows hard enough to dislodge her pierced earrings and as a result suffered a swollen cheek, bore defendant's handprint on her cheek and neck and required pain medication).

IV.

We conclude that the district court's decision cannot be upheld based upon the facts specifically advanced by the government to support it. Because it is possible that there were other facts adduced in this lengthy trial that supported the district court's determination, however, we will remand to allow the district court to elaborate on whether it relied upon additional facts in the record which were not advanced by the government, and which it failed to articulate at sentencing, that would satisfy the parameters we have set forth. If on remand the district court is unable to do so, it should resentence Lu, Ngu and Ho without imposing a two-point enhancement for "bodily injury." We will affirm as to all other issues raised on appeal.

TO THE CLERK:

Please file the foregoing opinion.

(illegible) LEWIS
Circuit Judge

APPENDIX D—Text of the Mann Act, 18 U.S.C. §§2421-2424

The Mann Act, 18 U.S.C. §§2421-2424, reads:

18 U.S.C. §2421:

> Whoever knowingly transports any individual in-interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. §2422:

> Whoever knowingly persuades, induced, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. §2423:

> Whoever knowingly transports any individual under the age of 18 years in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for

which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. §2424:

(a) Whoever keeps, maintains, controls, supports, or harbors in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien individual within three years after that individual has entered the United States from any country, party to the arrangement adopted July 25, 1902, for the suppression of the white-slave traffic, shall file with the Commissioner of Immigration and Naturalization a statement in writing setting forth the name of such alien individual, the place at which that individual is kept, and all facts as to the date of that individual's entry into the United States, the port through which that individual entered, that individual's age, nationality, and parentage, and concerning that individual's procuration to come to this country within the knowledge of such person; and

. . . . [Whoever fails to file or whoever falsifies information] [s]hall be fined not more than $2,000 or imprisoned not more than two years, or both.